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July 20, 1998

Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

RE: MM Docket No. 98-35

1998 Biennial Regulatory Review -- Review of the Commission's Broadcast Ownership Rules And Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996

NOTICE OF INQUIRY

Dear Sir or Madam,

Enclosed please find an original and 11 copies of The Media Institute's comments in the above proceeding. We have provided enough copies per the Notice of Inquiry for each Commissioner to receive a personal copy.

Sincerely,

Richard T. Kaplar
Vice President

Enclosures

DOCKET FILE COPY ORIGINAL

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
1998 Biennial Regulatory Review -- Review of the Commission's Broadcast Ownership Rules And Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	))))	MM Docket No. 98-35

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Comments of

The Media Institute

Patrick D. Maines
President

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July 21, 1998

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THE NEWSPAPER / BROADCAST CROSS OWNERSHIP BAN

The Media Institute, a nonprofit research foundation specializing in communications policy and First Amendment issues, has long advocated a robust and dynamic press, a strong First Amendment, and a competitive communications industry. The Media Institute responds here to the Federal Communications Commission's Notice of Inquiry released March 13, 1998, in which the Commission seeks comment on its broadcast ownership rules pursuant to the biennial review required by the Telecommunications Act of 1996.

While the Commission seeks comment on a number of rules, the Institute will limit its comments to a discussion of the Daily Newspaper / Broadcast Cross Ownership Rule.[1] Enacted in 1975, this is one of the Commission's few ownership rules that has not been modified, liberalized, or repealed entirely, thus rendering it long-overdue for review.

Section 202(h) of the Telecommunications Act of 1996 states that "[t]he Commission shall review ... all of its ownership rules biennially ... and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest."[2] In the case of the newspaper / broadcast cross ownership ban, this mandate raises the key question: Given the current state of competition in the media industry, does the cross ownership ban serve any purpose in promoting diversity and economic competition?

Our comments will discuss the rule in terms of competition, diversity, and the First Amendment, and will conclude that the rule is counterproductive and should be repealed.

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[1] In 1997, The Media Institute published a detailed analysis of the newspaper / broadcast cross ownership rule. *See* Richard T. Kaplar, *Cross Ownership at the Crossroads: The Case for Repealing the FCC's Newspaper / Broadcast Cross Ownership Ban* (The Media Institute, 1997).
[2] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, Sec. 202(h) (1996) ("Telecom Act").

COMPETITION AND THE CROSS OWNERSHIP BAN

The Notice of Inquiry[3] invites comment on the competitive effects of the newspaper / broadcast cross ownership ban on three markets: (1) delivered programming; (2) advertising; and (3) program production. It also invites comment on other economic effects, such as the economic viability of media outlets. We shall address these in turn.

Repeal of the Ban Would Have No Negative Effects on Markets for Programming, Production, or Advertising.

Delivered Programming. The Commission observes that newspapers do not operate in the market for either video or audio programming, and thus cross ownership would not appear to harm competition in the video or audio programming markets.[4] We believe this to be the case and concur with the Commission.

Program Production. The Commission states that "[n]ewspapers, being a print medium, are not a participant in the video and audio program production markets. Thus, relaxing this rule would not appear to harm competition in these supply markets."[5] Again we concur with the Commission on this assessment and conclusion.

Advertising. The Commission expresses concern that "permitting the owner of a broadcast TV or radio station to own a newspaper, or vice versa, could give the company the market power to raise local radio, television, and/or newspaper advertising rates, depending on the market share of the combined entity."[6]

This concern appears to be based on the assumption that newspapers and broadcast outlets are interchangeable or substitutable as a vehicle for advertisers. It is clear, however, that the two are not direct substitutes for each other. Newspaper advertising is mainly local

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[3] *1998 Biennial Regulatory Review -- Review of the Commission's Broadcast Ownership Rules and Other Rules Pursuant to Section 202 of the Telecommunications Act of 1996, Notice of Inquiry, MM Docket No. 98-35,* FCC 98-37 (released March 13, 1998) ("NOI").
[4] *Id.* at para. 35.
[5] *Id.* at para. 37.

while television advertising is primarily national. Local television ads lean heavily toward car dealers, while local newspaper display advertising relies on department stores, supermarkets, car dealers, and real estate interests. There is no broadcast equivalent to newspapers' classified advertising, and there is no newspaper equivalent to radio's highly segmented demographics according to station format. At most, perhaps, it could be said that newspapers and broadcast outlets are complementary media for a limited number of advertisers. Car dealers, for example, use both media but in different ways; broadcast ads typically alert consumers that a dealership is staging a special sale, while print ads contain extensive listings and prices for specific vehicles.

Moreover, since newspapers and broadcast outlets are not effective substitutes for each other, it does not follow that a cross owned newspaper and broadcast outlet would have the market power to raise advertising rates.[7] In fact, a more likely scenario would be just the opposite. The owner of both a newspaper and broadcast outlet might be inclined to offer a discounted "package deal" for advertising in both media. Other outlets in each medium would likely respond by matching the more competitive rates; thus, cross ownership could have the effect of enhancing competition and benefiting advertisers.

Our response to the Commission's advertising questions notwithstanding, we must note that the Commission's concern for the well-being of advertisers may be somewhat misplaced. Advertising issues do not fall within the purview of the Commission per se (with some limited exceptions for children's and political advertising). The FCC does not set advertising rates, review ad copy, investigate charges of fraudulent advertising, or otherwise interfere in the relationship between broadcasters and advertisers. Instances of monopoly pricing or other predatory, anticompetitive practices that affect advertisers properly fall under the enforcement authority of the FTC or the Justice Department.

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[6] *Id.* at para. 36.

[7] The example cited in the NOI ("Comments of David E. Hoxeng") seems inapt since it involved the purchase of one daily newspaper by another, rather than a cross ownership situation. *Id.* at 12 n.56.

Repeal of the Ban Would Have a Positive Effect on Industry Competition.

The NOI takes note of claims that cross ownership would lead to greater operating efficiencies and economic viability for media outlets. At the same time, it seems interested in these prospects only insofar as they "would produce benefits for broadcast audiences and advertisers."[8] We suggest that the Commission not view operating efficiencies as something of merely incidental benefit to media owners only. Indeed, the economic viability of media outlets is the *sine qua non* for audiences and advertisers. Economically unhealthy outlets will not survive, thereby reducing choices for audiences and advertisers. The level of competition in a local market is related directly to the economic viability of the outlets in that market -- and those factors, in turn, are related directly to the interests of audiences and advertisers. This economic viability, we believe, should be the *primary* focus of the Commission's interest in competition.

Economic advantages of cross ownership. In purely economic terms, media competition would be genuinely enhanced in a world without the newspaper / broadcast ban. Cross ownership would not result in media conglomerates of unlimited size; on the contrary, the number of broadcast outlets per market and percentage of national TV audience are clearly limited by the Telecommunications Act of 1996. Non-publishers, in fact, are already able to take advantage of the more competitive environment created by the Telecom Act, leaving newspaper publishers at a distinct competitive disadvantage.

Repeal of the ban would be expected to yield real increases in competition in the case of marginally profitable newspapers and broadcast outlets. Absent the cross ownership ban, a marginal broadcast outlet (most likely a UHF television station or a smaller radio station) could be acquired by a profitable newspaper, or a failing newspaper could be bought by a profitable broadcast outlet. Resources from the profitable outlet could be used to upgrade the marginal outlet, thereby strengthening its competitive posture in the local market -- or in many cases, no doubt, keeping it from going out of business

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[8] *Id.* at para. 39.

altogether. Increasingly, repeal of the ban would likely work to the benefit of struggling daily newspapers whose ranks have shrunk dramatically in recent decades.

Repeal of the Ban Would Reduce Market Inefficiencies.

The newspaper / broadcast cross ownership ban is couched in language that speaks of a dual purpose: creating viewpoint diversity and fostering economic competition. This biennial review seems an appropriate time to ask the Commission to reassess its historical rationale for fostering economic competition. When the FCC talks about increasing competition, it really is talking about prohibiting excessive media concentration. Yet the FCC's concern over market concentration is not primarily an economic one, like that of the FTC, but is directly related to its desire for viewpoint diversity. The Commission believes that having fewer media owners in a given market results in fewer voices reaching the public, and that having more owners yields more voices. Thus, when the Commission has discussed economic competition vis-à-vis cross ownership, it has been in the context of viewpoint diversity.

Indeed, the Commission explained the approach it took in fashioning the newspaper / broadcast ban as follows:

> [W]e have analyzed the basic media ownership questions in terms of this agency's primary concern -- diversity in ownership as a means of enhancing diversity in programming service to the public -- rather than in terms of a strictly antitrust approach....
>
> The distinction between our approach and the Justice Department's is best put this way. Justice and others applying traditional antitrust criteria are primarily interested in preserving competition in advertising ... and for their arguments they use analytic tools taken from economic studies of market share and the like. Conversely, the diversity approach would examine the number of voices available to the people of a given area.[9]

The only problem in tinkering with the economic dynamics of a market (*e.g.*, controlling entry and exit) to achieve a non-economic goal like viewpoint diversity is that

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[9] *Amendment of Sections 73.34, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, Second Report and Order*, 50 F.C.C.2d 1046 at paras. 11, 12 (1975) ("1975 Second Report and Order").

such tinkering may have a serious negative impact on the economic viability of the market itself. It is quite possible to kill off the speakers in the process of enhancing their diversity.

Repeal of the cross ownership ban would reduce the economic inefficiencies that occur when the Commission regulates an economic factor (market entry) to achieve a non-economic goal (viewpoint diversity). Consider a case in which the optimal buyer (in economic terms) for a particular outlet already owns an outlet in a different medium in that market. The Commission will not allow the purchase, thereby forcing the potential buyer to make another investment elsewhere that may be less than optimal. The outlet in question, meanwhile, may be bought by a less-than-optimal purchaser. There is no way to calculate the amount of resources that have been wasted through such inefficient allocation.

Neither competition nor diversity can be imposed efficiently through regulation. A truly competitive and diverse media marketplace is achieved by allowing market forces to work. Repealing the newspaper / broadcast cross ownership rule is a necessary element in reaching the level of competition that yields genuine diversity.

VIEWPOINT DIVERSITY AND THE CROSS OWNERSHIP RULE

The Commission's concept of diversity is ultimately one of viewpoint diversity in keeping with its perceived role as manager of the broadcast marketplace of ideas. This is consistent with the FCC's belief that the American broadcasting system is built on "the paramount right of the public in a free society to be informed...."[10] The Commission restates this position in its present Notice of Inquiry: "Like all of our multiple ownership rules, the newspaper / broadcast cross ownership rule rests on the twin goals of promoting diversity of viewpoint and economic competition."[11]

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[10] *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1249 (1949).
[11] NOI at para. 28.

The Cross Ownership Rule Is Not an Efficient Way To Create Viewpoint Diversity.

The Commission's desire to manipulate viewpoint diversity, however, presents a rather formidable problem. Short of becoming a programmer itself, or engaging in blatant and egregious censorship, the FCC does not have a legal way to mandate viewpoint diversity directly. That would require the type of pervasive and absolute authority over programming decisions long proscribed by statute.

Thus the FCC does the next best thing: It mandates ownership diversity as a proxy for viewpoint diversity. The Commission assumes that different owners will bring different editorial voices to the airwaves, resulting in diversity of viewpoints. As the FCC pointed out when it adopted the newspaper / broadcast restriction:

> The significance of ownership from the standpoint of "the widest possible dissemination of information" lies in the fact that ownership carries with it the power to select, to edit, and to choose the methods, manner and emphasis of presentation, all of which are a critical aspect of the Commission's concern with the public interest.[12]

But certainly there is no guarantee that the Commission's carefully chosen entrants will actually speak with different voices, or that commonly owned entrants will speak with the same voice. Thus, the Commission's licensing process is an inefficient means of controlling viewpoint diversity because it depends on guesswork -- trying to guess in advance what type of viewpoints a license applicant might actually broadcast. Likewise, the newspaper / broadcast ban is an inefficient means of promoting viewpoint diversity because it too relies on nothing more than assumptions about the likely viewpoints of media speakers.

SCARCITY AND THE CROSS OWNERSHIP RULE

Nothing has done more to give urgency to the FCC's quest for viewpoint diversity than the concept of scarcity. The idea that the electromagnetic spectrum is a limited

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[12] 1975 Second Report and Order, *supra* note 9 at para. 14.

resource with only so many frequencies to go around is as old as broadcasting itself. In the early days of radio, this unchallenged belief in spectrum scarcity led to three corollary views: (1) that the spectrum was too scarce to be availing of allocation measures like auctions or lotteries, and of market mechanisms like property rights; (2) that the spectrum was so scarce that it could easily by monopolized by a single large player; and (3) that the government was the most suitable entity to allocate frequencies and monitor their use. When the newspaper / broadcast ban was adopted in 1975, scarcity was still very much a part of the accepted wisdom; not only was it acknowledged as a controlling factor by the *Red Lion* Court, but it was cited by the FCC in 1974 as justification for retaining the Fairness Doctrine, another attempt at viewpoint diversity.[13]

Scarcity No Longer Exists in Numerical Terms.

As the Notice of Inquiry acknowledges, however, "there have been changes since the rule was adopted.... [T]here has been an increase in the number of radio and TV stations and local newspapers."[14] This is an understatement to be sure. The explosion in media since the early 1970s has been well documented and frequently recited. Suffice it to say here that since 1970, the year in which the cross ownership rulemaking began, the number of VHF and UHF television stations has grown by 80 percent; the number of AM and FM radio stations has increased 72 percent, and the number of basic cable subscribers has jumped from 4.5 million to over 62 million.[15] Add to this other forms of media such as DBS, MMDS, SMATV, videocassette recorders, and on-line interactive services, and the media landscape is far richer and more diverse than it was a mere two decades ago.

As far back as 1985, in fact, the Commission noted that media growth had resulted in ample viewpoint diversity -- that is, scarcity no longer existed:

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[13] *The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act*, 48 F.C.C.2d 1 (1974) ("1974 Fairness Report").
[14] NOI at para. 40.

We believe that the interest of the public in viewpoint diversity is fully served by the multiplicity of voices in the marketplace today and that the intrusion by government into the content of programming occasioned by the enforcement of the [fairness] doctrine unnecessarily restricts the journalistic freedom of broadcasters.[16]

The FCC acknowledged that the Supreme Court in *Red Lion* had upheld the Fairness Doctrine on the basis of media scarcity, noting that "the Court's decision was necessarily premised upon the broadcasting marketplace as it existed" in 1969:

But in the intervening sixteen years the information services marketplace has expanded markedly, thereby making it unnecessary to rely upon intrusive government regulation in order to assure that the public has access to the marketplace of ideas.[17]

And, as the Commission said in 1987:

To the extent that the [Supreme] Court is concerned about numerical scarcity in this medium ... with the explosive growth in the number of electronic media outlets in the 18 years since *Red Lion*, there is no longer a basis for this concern.[18]

Spectrum Is No More "Scarce" in Economic Terms Than Other Goods.

Still, it is not enough to satisfy critics by looking only at the phenomenal growth in the absolute number of media outlets, or at the abundant new media that have supplanted traditional broadcasting. We must also look at scarcity as it is viewed in the study of economics.

Proponents of the scarcity rationale invariably fall back on the words of Justice White, that there will always be scarcity as long as there are "substantially more individuals who want to broadcast than there are frequencies to allocate."[19] This argument sounds rather compelling on its face, and could be used to justify scarcity no matter how large the

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[15] Calculated from 1970 numbers in *Amendment of Syndication and Financial Interest Rules, Tentative Decision and Request for Further Comments in BC Docket No. 82-345*, FCC 83-377, 48 Fed. Reg. 38,020 (Aug. 4, 1983), and 1997 numbers in *Broadcasting & Cable Yearbook 1997* (R.R. Bowker, 1997) at xxi.
[16] *Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees*, 102 F.C.C.2d 145, 147 (1985) ("1985 Fairness Report").
[17] *Id.* at 148 citing *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).
[18] *Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning Alternatives to the General Fairness Doctrine Obligations of Broadcast Licensees*, 2 FCC Rcd. 17 5272 (1987).
[19] *Red Lion v. FCC*, 395 U.S. at 388.

absolute number of outlets. It begs the question, however, by confusing the concept of physical scarcity with the concept of economic scarcity.

Scarcity in the broadcast context has historically been based on physical limits -- the idea that anyone can go out and start a newspaper because there is an expandable supply of printing presses, but not everyone can be a broadcaster because there is only a finite number of broadcast frequencies.

In economic terms, however, all resources that are not infinite are "scarce." That is, if something is priced low enough there will not be enough of that item for everyone who wants it. That is the function of pricing: All resources are "scarce," but no resource is scarce (*i.e.*, in short supply) at a high enough price.

No one on the bench understood economic scarcity better than Judge Robert Bork. Writing in 1986 in the *TRAC* case, he set out the economic distinction clearly:

> It is certainly true that broadcast frequencies are scarce but it is unclear why that fact justifies content regulation of broadcasting in a way that would be intolerable if applied to the editorial process of the print media.... Not everyone who wishes to publish a newspaper, or even a pamphlet, may do so. Since scarcity is a universal fact, it can hardly explain regulation in one context and not another....[20]

Those who invoke the economic scarcity argument (*i.e.*, that there are more potential broadcasters than frequencies) inevitably neglect to mention that, in this economic sense, all goods (even printing presses) are "scarce." Furthermore, they neglect to take account of the secondary market in broadcast licenses which, by maintaining fair-market prices, ensures that there is no shortage of licenses available to buyers willing to pay the market price. This misreading of economic theory is a handy tool, however, because it makes it possible to invoke a "scarcity" argument in perpetuity, regardless of the growth in absolute numbers of media outlets.

Since there is no media scarcity today, the government's interest in imposing a regulatory regime on broadcasters (and newspaper owners) to achieve diversity loses all

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[20] *Telecommunications Research and Action Center v. FCC*, 801 F.2d 501, 508 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987).

urgency. There is simply no reason to regulate diversity when a large and competitive media marketplace is already offering abundant diversity on its own. Given these conditions, it seems almost too obvious to say that there is no need for the newspaper / broadcast cross ownership ban.

FIRST AMENDMENT CONCERNS

The Cross Ownership Ban Amounts to an Unconstitutional Suppression of Speech.

The Commission's interest in promoting viewpoint diversity through the cross ownership ban is directly related to the suppression of free expression, and thus raises serious First Amendment concerns. Suppressing speech is precisely the purpose of an ownership ban that promotes viewpoint diversity by giving voice to certain types of speakers by stifling others. To impose diversity on the media marketplace of ideas, the government must necessarily suppress the free expression of certain speakers by denying them an opportunity to own an additional media outlet of their choosing. If the ban were challenged on constitutional grounds today, it would be subject at least to the intermediate scrutiny of the four-part *O'Brien* test.[21] It would appear that the ban would quickly run afoul of *O'Brien* Part 3: "The governmental interest must be unrelated to the suppression of free expression."

Part 4 would most likely prove problematic as well: "The incidental restriction on alleged First Amendment freedoms must be no greater than is essential to the furtherance of that interest." A regulation affecting virtually all of the country's daily newspapers, television stations, and radio outlets is hardly a "narrowly tailored" way to enhance diversity. Other less restrictive means can be found; for example, the government could promote diversity by easing market entry and taking other steps to encourage a larger and more robust communications industry. An analogy can be found in cable television: The

[21] *See United States v. O'Brien*, 391 U.S. 367, 377 (1968).

number of cable voices became much larger and more diverse when Congress deregulated that industry beginning in the late 1970s, undoing years of structural barriers to growth and competition.

The Ban Could Not Withstand Today's Higher Burden of Proof.

Moreover, in recent years the Supreme Court has demanded a higher burden of proof on speech restrictions generally, requiring that a restriction on speech be based on a factual record in response to a documented problem. As the Court stated in *Turner Broadcasting*:

> When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must ... demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.[22]

When it initiated the cross ownership rulemaking, however, the FCC noted "an absence of any definitive measurement of the degree to which mass communications actually influence thought and behavior."[23] And when it adopted the rule in 1975 the Commission stated "it is not necessary to have proof of abuses before we can act," and later noted that "[t]he rules are not in the least premised on the existence of improprieties in the operation of the media holdings."[24]

Supporters of the ban point out that it has already withstood a constitutional challenge. The rule did in fact reach the Supreme Court in 1978, less than a decade after *Red Lion*, and was upheld on the scarcity rationale.[25] Relying heavily on *Red Lion*, the Court took note of the broadcast spectrum's "physical limitations" and "finite number of frequencies." How the Court would react today, of course, is another matter. In 1984 the

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[22] *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 664 (1994). *See also 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 116 S. Ct. 1495 (1996) (merely "rational" or "reasonable" judgment of regulators absent an evidentiary record not entitled to judicial deference).

[23] *Amendment of Sections 73.35, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, Further Notice of Proposed Rulemaking*, 22 F.C.C.2d 339, 344 n.6 (1970) (citation omitted).

[24] 1975 Second Report and Order, *supra* note 9 at paras. 112 n.29, 119.

Court acknowledged in *FCC v. League of Women Voters* that "[t]he prevailing rationale for broadcast regulation based upon spectrum scarcity has come under increasing criticism in recent years" and indicated that it would reevaluate the scarcity rationale if it received a signal from Congress or the FCC.[26]

Meanwhile, the Supreme Court's holding in *Buckley v. Valeo* may prove instructive, that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment...."[27] Yet that is precisely what the newspaper / broadcast ban does: It creates a "privileged class" of speakers comprising those who do not already own a newspaper in the market where they wish to acquire a broadcast outlet, and vice versa. Those who already own an outlet become, in effect, a disfavored class of speakers whose further speaking opportunities are proscribed by the FCC.

The fact that the newspaper / broadcast ban suppresses speech in a manner unlikely to withstand constitutional scrutiny is reason enough to contemplate its immediate repeal.

CONCLUSION: THE NEWSPAPER / BROADCAST CROSS OWNERSHIP BAN SHOULD BE REPEALED

When the newspaper / broadcast cross ownership ban is measured by any standard, the conclusion is the same: The rule no longer serves any purpose (if it ever did) and should be repealed. We can summarize some of the reasons for repeal as follows:

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[25] *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978).
[26] *FCC v. League of Women Voters of Calif.*, 468 U.S. 364, 376-77 (1984). *See* Robert Corn-Revere, "Red Lion and the Culture of Regulation," and Robert M. O'Neil, "Dead or Alive: How Long Will the Red Lion Specter Haunt Free Speech and Broadcasting?" in Robert Corn-Revere, ed., *Rationales & Rationalizations: Regulating the Electronic Media* (The Media Institute, 1997).
[27] *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

Market Conditions Have Changed Dramatically Since the Ban Took Effect in 1975.

The ban was adopted in response to the media market of the late 1960s and early '70s -- a time when the newspaper industry was relatively robust, the "big three" networks ruled television, UHF TV was barely a force, and cable had yet to explode as the dominant distribution system. Other "new media" like DBS, "wireless cable," VCRs, and on-line interactive services were years and even decades away from becoming household items.

Media Scarcity No Longer Exists, Eliminating Any Need for the Government To Impose Diversity.

The ban was based on the premise that government had to impose viewpoint diversity because broadcast media were a scarce resource. Today, however, there is no scarcity whatsoever in the electronic media marketplace by any measure. Absolute numbers of TV and radio stations have increased sharply (from 862 television stations in 1970 to over 1,500 today, for example). In economic terms, spectrum is no more "scarce" than other goods (even printing presses and ink), and a lively secondary market in broadcast licenses ensures that there is no shortage of stations available to buyers willing to pay a fair-market price. Moreover, would-be speakers have unprecedented access to the media through local access, leased access, and PEG cable channels, plus access to a worldwide audience on the Internet.

The Ban Is of Dubious Constitutional Validity.

In upholding the ban in 1978, the Supreme Court relied on the *Red Lion* scarcity rationale and applied a relaxed standard of scrutiny. Today, if the Court agreed that scarcity was no longer a significant problem, it would have to apply at least the intermediate scrutiny of the *O'Brien* test. The ban would not survive such a challenge, because there is no factual record that it advances the government's interest in diversity, and it is not a narrowly tailored means, or even a reasonable means, of advancing that interest.

Repealing the Ban Would Improve Competition.

One of the stated goals of the newspaper / broadcast ban is to improve competition, but the rule has become decidedly counterproductive in that regard. Congress and the Commission have wisely repealed restrictions on most other types of cross ownership, but that has left the playing field tilted steeply against those who would like to own a newspaper and broadcast outlet in the same market. These individuals are now at a competitive disadvantage vis-à-vis common owners of newspapers and cable systems, television and radio stations, and television stations and cable systems -- not to mention the owners of "grandfathered" newspaper / broadcast combinations.

In addition, the rule works against competition by making it impossible for a weak newspaper or broadcast outlet to benefit from the resources of a strong partner in the other medium, potentially forcing some outlets out of business. Moreover, if the rule were repealed, the Department of Justice and the Federal Trade Commission would continue to oversee the media industry, as they do other industries, to guard against excessive economic concentration and anticompetitive practices.

*   *   *   *

We are aware of the fact that the Commission was prohibited by Congress from repealing the newspaper / broadcast ban from 1988 to 1996. However, the opportunity to consider repeal of the ban seems especially timely today. By the criterion stated in the Telecom Act and the Notice of Inquiry, a high level of competition currently exists in the media industry, rendering the cross ownership ban unnecessary. The Commission itself recognized that an adequate level of competition and diversity existed as far back as 1985.

In fact, the cross ownership ban has become counterproductive, restricting competition in this segment of the industry even as other segments have become more competitive owing to the repeal of other ownership restrictions. For all of these reasons, we urge the Commission to repeal the daily newspaper / broadcast cross ownership ban.

Respectfully submitted,

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